Supreme Court, U.S.
FILED

96 731 SEP 30 1996

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

CHARLES AND CLAUDIA SCHULTZ,

Petitioners,

vs.

CONSOLIDATION COAL COMPANY, a foreign corporation, and BERT SHELEK,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

CHARLES E. SCHULTZ
CLAUDIA M. SCHULTZ
RD 3 Box 150A
Wheeling, WV 26003
304-547-5574

65 pp

QUESTION(S) PRESENTED

1. Verify that the June 1, 1991 West Virginia Surface Mining Reclamation Regulations were in effect in 1992 even though the US Department of the Interior, Office of Surface mining Reclamation and Enforcement (OSM) did not approve the regulation until February 21, 1996, for purposes of state law (Federal Register 2-21-96, App. 37).

2. Whether Consolidation Coal Company (CONSOL) had the right to mine coal under our property and cause damage without having to pay for it as Mr. Shelek told us and the subsidence agreement he had us sign states.

3. Whether CONSOL committed an act of fraud against Charles and Claudia Schultz.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

CONCLUSION 5

INDEX TO APPENDICES

APPENDIX A: DECISION OF STATE SUPREME COURT ..... App. 1

APPENDIX B: DECISION OF CIRCUIT COURT OF MARSHALL COUNTY ..... App. 27

APPENDIX C: WEST VIRGINIA SURFACE MINING RECLAMATION REGULATIONS EFFECTIVE JUNE 1, 1991 ..... App. 31

APPENDIX D: FEDERAL REGISTER, WEDNESDAY FEBRUARY 21, 1996 ..... App. 35

APPENDIX E: LETTER OF JOHN C. AILES ... App. 44

APPENDIX F: LETTER OF STEPHEN C. KEEN ..... App. 46

APPENDIX G: CONSOL'S PERMIT TO MINE COAL EFFECTIVE 12-31-91 .... App. 49

APPENDIX H: SUBSIDENCE AGREEMENT ... App. 51

APPENDIX I: FEDERAL REGISTER, FRIDAY JULY 28, 1995 ..... App. 53

TABLE OF AUTHORITIES

Page

STATUTES AND RULES

WVSMR Effective June 1, 1991 ..... 1, 2

US SMCRA (1977) 1

OTHER

Federal Register 3

Policy Directive Letter of John C. Ailes 3

Policy Directive Letter of Stephen C. Keen .....App. 46

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix *A* to the petition and is unpublished.

The opinion of the *Marshall County Circuit* court appears at Appendix *B* to the petition and is unpublished.

JURISDICTION

The date on which the Supreme Court of Appeals of West Virginia decided Petitioner's case was *July 12, 1996.* A copy of that decision appears at Appendix *A.*

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

June 1, 1991 West Virginia Surface Mining Regulations

United States Surface Mining and Control Act of 1977 (US SMCRA)

STATEMENT OF THE CASE

In August of 1992, Consol, through their land agent, Bert Shelek, came to us and intimidated us into signing a "Subsidence Agreement" before they mined the coal under our property, using their long wall method of mining. The mining was done on or about August 31, 1992 according to Consol.

Consol repeatedly told us, and put in writing in the subsidence agreement that they had the right to mine the coal without paying for damages and that if we did not sign their subsidence agreement we would get nothing. We, unfortunately believed them.

After signing the agreement, we started becoming aware of the West Virginia Surface Mining Reclamation Regulations (WVSMR) that went into effect on June 1, 1991, which provided that coal operators now had to pay for subsidence damages.

However, Consol has insisted that the coal severance deeds they have that were recorded in Marshall County, WV, in the early 1900's still gave them permission to mine without paying for damages.

We later sued for fraud.

In the lower courts and the West Virginia Supreme Court, the courts upheld the coal severance deeds that were signed in the early 1900's. The WVSMR effective June 1, 1991, however, changed all that by requiring coal operators to pay for subsidence damage to surface lands, structures, facilities, and water supplies of the owners of the surface.

Justice Workman, in her opinion stated that this regulation was not in effect because it had never been approved by OSM. Justice Workman either overlooked or was not aware that OSM did approve the regulations on February 21, 1996, retroactive to June 1, 1991, for purposes of state law. (Please read attached federal register for 2-21-96, App. 37 and App. 40.)

Consol was definitely aware of these regulations since the permit No. U-1025-91, that it used to mine the coal under the Schultz property, was effective December 31, 1991, and was obtained under the new regulation that was effective June 1, 1991.

Attached policy directive letter dated March 23, 1993 from John C. Ailes, of the West Virginia Department of Environmental Protection, (WVDEP) clearly clarifies to WVDEP people that permits issued after June 1, 1991 do not allow for waiving subsidence liability.

REASONS FOR GRANTING THE PETITION

This court should grant Certiorari because this case involves the fundamental rights of all property owners in the state of West Virginia and many out of state owners as well. The fact that during 1995, West Virginia alone had nearly 1100 underground mining operations. The growing use of the "long wall" method of mining in West Virginia and throughout the United States will mean that more and more people will have subsidence damage to their homes, property and water supplies, makes this case one of national importance as well as one of great urgency.

The fact that a large corporation like CONSOL would send their land agent to contact small landowners like ourselves to intimidate us by telling us that CONSOL has the right to mine the coal under our property without paying us for damages and that we would get nothing unless we signed their subsidence agreement. While at the time CONSOL did this, they were certainly aware of the WVSMR effective June 1, 1991 that clearly gave us landowners rights of protection against subsidence damages. Besides the fact that what CONSOL was telling us was legally wrong and fraudulent, more than that, they were morally wrong. No corporation should be allowed to do to any citizen of this country what they have done to us.

Besides, if CONSOL did have the right to mine without paying for damages, they did not need us to sign their agreement. This is where the three elements of fraud come into being.

1. "The act claimed to be fraudulent was the act of the defendant or induced by him."

A. CONSOL certainly induced the fraud by telling us they had the right to mine without paying for damages.

2. "That it was material and false: that the plaintiff relied upon it and was justified under the circumstances in relying upon it."

B. By putting in writing in the subsidence agreement that CONSOL had the right to mine without paying for damages, we certainly relied upon it and believed that CONSOL would not have put it in their agreement if it

were not true. It certainly was material and false based on the WVSMR Effective June 1, 1991, which we found out later.

3. "That he was damaged because he relied upon it."

C. We were certainly damaged in that since we signed the agreement, we are limited by how much we can be paid for damages and by not getting our destroyed natural water supplies replaced in total quantity, quality and with natural water supplies. CONSOL certainly gained from this fraudulent act since they could mine without regards to subsidence damage.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. SCHULTZ
CLAUDIA M. SCHULTZ

Date: 9-25-96

APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1996 Term

No. 23174

CHARLES SCHULTZ AND CLAUDIA SCHULTZ,
Plaintiffs Below, Appellants

v.

CONSOLIDATION COAL COMPANY,
A FOREIGN CORPORATION, AND
BERT SHELEK
Defendants Below, Appellees

Appeal from the Circuit Court of Marshall County
Honorable Mark A. Karl, Circuit Judge
Civil Action No. 93-C-50K

AFFIRMED

Submitted: April 23, 1996
Filed: July 12, 1996

Robert J. Shostak
Shostak Law Office
Athens, Ohio
Attorney for Appellants

Michael W. McGuane
Haranzo & McGuane
Wheeling, West Virginia
Attorney for Appellants

Thomas C. Schultz
Wheeling, West Virgnia
Attorney for Appellants

Dean K. Hunt
Jackson & Kelly
Lexington, Kentucky
Attorney for Appellees

Brann Altmeyer
Phillips, Gardill, Kaiser
& Altmeyer
Wheeling, West Virgnia
Attorney for Appellees

JUSTICE WORKMAN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. "The essential elements in an action for fraud are: '(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that the plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.' *Horton v. Tyree*, 104 W. Va. 238, 242, 139 S.E. 737 (1927)." Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

3. Pursuant to 30 Code of Federal Regulation § 732.17(g), whenever changes to laws or regulations that

make up the approved state program regarding surface mining reclamation are proposed by the state, no such change to the laws or regulations shall take effect for purposes of a state program until approved as an amendment by the Office of Surface Mining Reclamation and Enforcement.

4. "When a provision of the West Virginia Surface Coal Mining and Reclamation Act, *W. Va. Code*, 22A-3-1 *et seq.*, is inconsistent with federal requirements in the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.*, the state act must be read in a way consistent with the federal act." Syl. Pt. 1, *Canestraro v. Faerber*, 179 W. Va. 793, 374 S.E.2d 319 (1988).

5. A state regulation enacted pursuant to the West Virginia Surface Coal Mining and Reclamation Act, West Virginia Code §§ 22A-3-1 to -40 (1993), [now West Virginia Code §§ 22-3-1 to -32 (1994 & Supp.1995)], must be read in a manner consistent with federal regulations enacted in accordance with the Surface Mining Control and Reclamation Act, 30 United States Code Annotated §§ 1201 to-1328 (1986).

6. "Under the West Virginia common law of property, the well recognized and firmly established rule is that when a landowner has conveyed the minerals underlying the surface of his land, he retains the right to the support of the surface in its natural state, but the owner of land may release or waive his property right of subjacent support by the use of language that clearly shows that he intends to do so; however, this law has been modified to some extent by the enactment of the West Virginia Coal Mining and Reclamation Act, *W. Va. Code*,

22A-3-1 [1985], *et seq.* and the extent of such modification will be ruled upon when properly presented." Syllabus, *Rose v. Oneida Coal, Co.*, 180 W. Va. 182, 375 S.E.2d 814 (1988).

Workman, Justice:

Charles and Claudia Schultz appeal the May 22, 1995, final order of the Circuit Court of Marshall County, granting summary judgment to the Appellees, Consolidated Coal Co. ("Consol") and Bert Shelek, in connection with the Appellants' attempt to set aside a subsidence agreement they entered into with Consol. Based on our review of the record, the parties' briefs and arguments, and all other matters submitted before this Court, we find that the lower court committed no error in granting summary judgment and, accordingly, we affirm.

I.

The Appellants own the surface estate to a parcel of real property in Marshall County, West Virginia, including two dwellings, one of which the Appellants occupy, and the other of which they lease. Consol owns the coal mineral estate underlying the Appellants' property pursuant to coal severance deeds that were recorded in Marshall County. The severance deeds contain the following provision:

> Together with all the rights and privileges necessary and useful in the mining, removing and manufacturing of the said coal *including the right of mining the same without leaving any support for the overlying stratus and without liability for any injury which may result to the surface from*

> *the breakage of said strata,* the right of ventilation and drainage, and of access to the mines for men and materials; the shafts or openings for such purposes, however, to be in the ravines and waste places upon said lands, and not nearer than Forty rods of the principal buildings thereon. Also, the right of mining, ventilating, draining and transporting the coal of other lands through the mines and openings in and upon the lands of the party of the first part, *and generally freed and discharged from all servitude to overlying land and everything therein and thereon* . . . . (Emphasis added).

On March 29, 1989, Consol provided the Appellants with written notice by certified mail, that based upon its mining projections, the company would soon begin mining beneath or adjacent to the Appellants' property. The letter advised the Appellants to contact Mr. Bert Shelek, Consol's land agent, if they had any questions concerning the scheduled mining activities.

On February 5, 1992, in response to the Appellants' request, Mr. Shelek met with the Appellants at their residence to discuss Consol's intention to begin underground mining operations beneath the Appellants' farm and home in August of 1992. Mr. Shelek provided the Appellants with an unsigned copy of a proposed document entitled "Subsidence Agreement." The Appellees state in their brief that the purpose of the agreement was to provide a mechanism for repair of the Appellants' property and to compensate them for their inconvenience and possible subsidence damages resulting from the underground mining.

Subsequently, the Appellants conferred with their attorney, Mike McGuane, regarding the terms of the subsidence agreement. By letter dated June 25, 1992, Mr. McGuane advised Mr. Shelek that he was representing the Appellants and inquired as to whether Consol intended to undermine the Appellants' property. In this letter, Mr. McGuane specifically asked whether Consol believed that it had the authority to undermine within 300 feet of the Appellants' dwellings under the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA"), West Virginia Code §§ 22A-3-1 to -40 (1993).[1] By letter dated July 14, 1992, Mr. Shelek confirmed to Mr. McGuane that Consol intended to undermine the Appellants' property and advised him that it was Consol's position that "it may longwall underneath your client's dwellings without violating the . . . [WVSCMRA]."[2]

The Appellants allege that Mr. Shelek went to their home on several occasions after his initial visit and told them that Consol could mine under their property and

---

[1] In 1994, the legislature repealed West Virginia Code §§ 22A-3-1 to -4. The current version of the WVSCMRA is found at West Virginia Code §§ 22-3-1 to -32 (1994 & Supp.1995).

[2] According to record, the Appellants originally argued that Consol knowingly committed fraud because it did not have a right to underground mine within 300 feet of the Appellants' dwelling without their consent. The Appellants, however, abandoned this theory after their own expert testified during deposition that the provision upon which the Appellants relied for their fraud cause of action was inapplicable to subsidence caused by underground mining.

cause damage without liability.[3] According to the Appellants, Mr. Shelek proceeded to tell them that in order to be compensated for any damages resulting from the mining operations they had to sign the subsidence agreement, otherwise they would "get nothing."

On or about August 14, 1992, the Appellees allege that Mr. Schultz, after consulting with his counsel, telephoned Mr. Shelek and requested that a meeting be scheduled for the Appellants to sign the agreement, and for Consol to remit the "up front" cash payment of $21,500 proposed under the agreement. On August 17, 1992, Mr. Shelek met with the Appellants at their home and obtained an executed agreement.[4] In accordance with the agreement, on September 4, 1992, Consol paid the Appellants the "up front" money by check.

In late August or early September 1992, during the course of Consol's longwall mining operation,[5] the

---

[3] For purposes of the summary judgment motion, Consol did not dispute that the statements attributed to Mr. Shelek were made by him.

[4] The Appellants asserted that their attorney was on vacation and, therefore, was unable to advise them. Through this assertion, the Appellants imply that they entered into the Subsidence Agreement without consulting with their attorney. The record, however, indicates that they did not receive the "up front" money until over two weeks after signing the agreement. Certainly there was time for consulting with their attorney prior to cashing the Appellees' check.

[5] It is important to note that the mining operations were conducted pursuant to all required permits issued by the West Virginia Department of Energy ("DOE") (now known as the Division of Environmental Protection ("DEP")), the entity charged with administering the WVSCMRA.

Appellants reported to Consol suspected incidents of subsidence-related damage to their structures and water supplies.[6] Consol maintains that it has proceeded to address these reported incidents in accordance with the terms of the agreement and the provisions of West Virginia's surface mining regulations.[7]

II.

STANDARD OF REVIEW

Our review of a circuit court's entry of summary judgment is de novo. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Further,

> [s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has

---

[6] As we held in *Rose v. Oneida Coal Co.*, 195 W. Va. 726, 466 S.E.2d 794 (1995) ("*Oneida II*"), "[n]either the West Virginia Surface Coal Mining and Reclamation Act, W. Va.Code, 22A-3-24(b) [now W. Va.Code, 22-3-24 (1994)], nor its federal counterpart in 30 U.S.C. § 1307 of the Surface Mining Control and Reclamation Act relating to the replacement of surface water, is applicable to the operation of an underground coal mine." 195 W. Va. at ___, 466 S.E.2d at 795, Syl. Pt. 3. Consequently, there was no legal requirement for underground coal mining operations to replace surface water supplies at the time the underground mining operations occurred in the instant case. *See id.* We do note, however, that under the passage of the national Energy Policy Act of 1992, SMCRA was amended to require underground mining operations to replace water supplies damaged by mining conducted after October 24, 1992.

[7] The Appellants have never alleged that Consol has breached the terms of the subsidence agreement.

> failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Id. at 190, 451 S.E.2d at 756, Syl. Pt. 4. Consequently, the Appellants have the burden of proving that the Appellees committed fraud. As we stated in syllabus point one of *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981):

> The essential elements in an action for fraud are: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that the plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it." *Horton v. Tyree*, 104 W. Va. 238, 242, 139 S.E. 737 (1927).

167 W. Va. at 272-73, 280 S.E.2d at 67, Syl. Pt. 1. Accordingly, in order to uphold the circuit court's entry of summary judgment in the Appellees' favor, we must determine whether the Appellants failed to make a sufficient showing on any of the above-mentioned essential elements of fraud.

III.

STATUS OF DEED WAIVERS

The crux of the Appellants' argument centers upon whether Consol was indeed legally liable for damage to structures on the Appellants' property at the time its agent represented to them that it was not.[8] The Appellants contend that Consol knew or had reason to know

---

[8] We note at the outset that Consol does not dispute its obligation as a mine operator to restore the land to a condition

that the law in effect in West Virginia during the time their land agent, Mr. Shelek, was talking to them required Consol to repair subsidence damage to structures or compensate the owner for damages to structures, regardless of any deed waiver the Appellees may have previously obtained. Consequently, the Appellants maintain that Mr. Shelek's statement that they must sign the subsidence agreement before Consol engaged in underground mining or Consol would owe them nothing for any damage which might occur was an obvious false statement intended to coerce them into signing the agreement. In contrast, the Appellees assert that the Appellants wrongfully contend that Consol intentionally made a material false representation to them, because the deed damage

---

capable of supporting the uses the land was capable of supporting prior to the mining activity. *See* Syl. Pt. 4, *Oneida II*, 195 W. Va. at 727-28, 466 S.E.2d at 795-96. While the Appellants tangentially argue that they are also entitled to damages from Consol for harm caused to their property by underground coal mine subsidence, they preface their entitlement to such damages upon alleged misrepresentations that Consol's agent made regarding Consol's duty to repair damage to structures. In other words, the Appellants mix apples with oranges by claiming that they are entitled to *property damages* from mine subsidence because of alleged misrepresentations Consol made regarding its duty to repair *damages to structures*. First, the Appellees never made any misrepresentations regarding Consol's duty to restore any damage to the Appellants' property and, the Appellees have not disputed their duty to restore the land in compliance with *Oneida II*. *See id*. Since we ultimately conclude that the Appellants failed to present sufficient evidence to prove that the Appellees intentionally deceived them with material and false misrepresentations, we find no merit regarding any claim to property damages. *See* Syl. Pt. 1, *Lengyel*, 167 W. Va. at 272-73, 280 S.E.2d at 67.

waiver relating to structures was not legislatively invalidated on June 1, 1991.

A.

THE REGULATIONS

In order to ascertain whether the Appellees fraudulently misrepresented to the Appellants that they had the right to mine under their property without consequent liability to repair any damage to the structures upon the Appellants' property, it is necessary to review a rather convoluted history of the statutory and regulatory provisions for subsidence mining in this state. In 1979, the Office of Surface Mining Reclamation and Enforcement ("OSM"), an agency within the United States Department of the Interior, initially developed regulations for underground mines pursuant to the Surface Mining Control and Reclamation Act ("SMCRA"), 30 United States Code Annotated §§ 1201 to-1328 (West 1986). 44 Fed. Reg. 14902 (March 13, 1979). The pertinent federal regulation contained a provision requiring "each person who conducts underground mining which results in subsidence that causes material damage . . . [to][r]estore, rehabilitate or remove and replace each damaged structure . . . to the condition it would be in if no subsidence had occurred. . . . " *Id.* at 15440 (codified at 30 C.F.R. § 817.124(b)(1)). In the alternative, under this regulation the person also could either purchase the damaged structures or facilities or compensate the surface structure owners by the amount of diminution in value to the structure caused by the subsidence. *Id.* at 15440- 41 (codified at 30 C.F.R. § 817.124(b)(2) & (c)). This regulation

did not expressly state whether it invalidated existing deed waivers pursuant to state common law allocating the risk of subsidence damage.[9] In 1981, the state adopted the identical version of the above-mentioned federal provision.[10]

On June 1, 1983, the OSM revised the subsidence regulation to require an operator either to correct or compensate material damage from subsidence damage to structures or facilities "[t]o the extent required under State law." 48 Fed. Reg. 24652 (June 1, 1983) (codified at 30 C.F.R. § 817.121(c)(2)). Specifically, the OSM commented that "to the extent a waiver of surface support is recognized under State law . . . it will be given effect with respect to structures and facilities under § 817.121(c)." 48 Fed. Reg. 24645 (June 1, 1983). On November 16, 1983, the OSM approved West Virginia's revised regulation that similarly deferred to state law in regard to subsidence damage to structures:

> Each person who conducts underground mining which results in subsidence that causes material damage or reduces the value or reasonably foreseeable uses of the surface lands shall

---

[9] It was not until some years later that the United States District Court for the Northern District of West Virginia resolved this issue by concluding that the 1979 federal regulation and 1981 state regulation did not supersede West Virginia state common law related to deed waivers of subjacent support. *See Smerdell v. Consolidation Coal Co.*, 806 F.Supp. 1278, 1284 (N.D. W. Va.1992).

[10] The DOE's authority to promulgate regulations in accordance with WVSCMRA originates in West Virginia Code § 22A-3-2.

restore the land to a condition capable of supporting uses it was capable of supporting before subsidence. *He shall also, where such person does not specifically possess the right to subside without liability to surface owners, at the option of the owner of each such damaged structure*:

1. Restore, rehabilitate or remove and replace each damaged structure promptly after the damage is suffered, to the condition it would be in if no subsidence had occurred; or

2. Purchase the damaged structure for its fair market, presubsidence value and shall promptly, after subsidence occurs, insure that it does not constitute a public nuisance or a hazard to health and safety or the environment; or

3. Compensate the owner of any surface structure in the full amount of the diminution in value resulting from subsidence.

Chapter 20-6, Series VII (1982) Section 7C.02(b) (emphasis added).

In 1984, the United States District Court remanded the 1983 federal regulation because the court determined that the OSM had not provided a sufficient opportunity for public comment on the regulation as required by the Administrative Procedures Act. *In re: Permanent Surface Mining Regulation Litigation*, No.79-1144, 21 ERC 1724, 1732 (D.D.C.1984). Upon completion of this litigation, the OSM re-proposed the exact same subsidence provision that expressly deferred to state law with respect to damage to surface structures. 50 Fed. Reg. 27910 at 27911 (July 8, 1985). On February 17, 1987, the OSM issued the final rules promulgated pursuant to the *In re: Permanent Surface Mining Regulation Litigation* and "[u]nder the final

rule, operator responsibility for material damage to structures or facilities resulting from subsidence will derive from applicable provisions of State law." 52 Fed. Reg. 4860 (February 17, 1987).[11]

On September 9, 1988, West Virginia revised the state regulation to track the federal language as part of a "Repealer Package:"

> *Material Damage.* The operator shall:
>
> . . . .
>
> (2) *To the extent required under applicable provisions of State law,* either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. . . .

---

[11] Also, in the 1987 federal register notice the OSM noted the status of West Virginia's regulatory program:

> [I]t appears that West Virginia favors the change since it immediately and voluntarily implemented the change promulgated in the 1983 final rule by amending its State program to eliminate the absolute requirement to restore imposed by the 1979 OSMRE rules. . . . In any event, because . . . West Virginia already ha[s] programs which are consistent with this final rule, there will be no change required from the status quo.

52 Fed. Reg. 4865 (February 17, 1987).

38 W. Va. C.S.R. § 2-16.2 (1988) (emphasis added). This language, however, was not approved by the state's legislative rulemaking review committee and was thus never acted upon by the OSM. It was not until April 26, 1989, that the state submitted the above-mentioned language to the OSM for its approval after a new package of state regulation revisions was approved by the state's legislative rulemaking review committee.[12]

While the regulation was awaiting the OSM approval, on April 12, 1990, the United States District Court for the District of Columbia rejected the state law deference contained in 30 Code of Federal Regulation § 817.121(c)(2) (1988). *National Wildlife Federation v. Lujan*, 733 F.Supp. 419, 426-429 (D.C.1990), *rev'd*, 928 F.2d 453 (D.C.Cir.1991). According to the district court, an operator had a duty under SMCRA to repair or compensate an owner for subsidence damage to structures regardless of any waiver under state common law. *Id.* at 426.

In response to the *Lujan* decision, on May 23, 1990, the OSM approved the West Virginia regulation that originally was submitted on April 26, 1989, with the exception that the OSM did not approve the following language deferring to state law because of the *Lujan* decision: "[t]o the extent required under applicable provisions of State law." 55 Fed. Reg. 21304 at 21331 (May 23, 1990). This federal register notice was followed by a letter dated June 22, 1990, from W. Hord Tipton, the Deputy

---

[12] According to the Appellees' brief, the regulatory reform package that the state submitted for the OSM approval on April 26, 1989, was revised by the state on December 19, 1989, and February 7, 1990.

Director of Operations and Technical Services of the OSM, to Larry George, then Commissioner of the West Virginia DOE, notifying him that due to the *Lujan* decision, even though the OSM's disapproval of the language deferring to state law was sufficient to bring the state regulation into accord with the federal regulation pursuant to 30 Code of Federal Regulations § 732.17(d), "to avoid confusion, I recommend that you amend the rule in question to remove the disapproved language."

Consequently, on January 17, 1991, the DEP proposed, and the legislative rulemaking review committee agreed, that the following language in the West Virginia surface mining regulations at 38 West Virginia Code of State Regulations § 2-16.2 be deleted to bring that regulation into accord with the *Lujan* decision: "To the extent required under applicable provisions of State law." The regulation was to take effect on June 1, 1991. This change, however, was never approved by the OSM as required by 30 Code of Federal Regulations § 732.17(g).[13]

Subsequently, on March 22, 1991, the United States Court of Appeals for the District of Columbia Circuit overruled the February 12, 1990, district court ruling in

---

[13] This federal regulation provides:

> (g) Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the Director as an amendment. *No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.*

30 C.F.R. § 732.17(g) (emphasis added).

Lujan. See National Wildlife Federation v. Lujan, 928 F.2d 453 (D.C.Cir.1991). The court of appeals reversed the district court by "declin[ing] to hold that the operators' duty to compensate for all subsidence damage to structures is essential to the SMCRA scheme to prevent subsidence." *Id.* at 458. Thus, the court of appeals concluded that SMCRA does *not* impose a duty to restore structures damaged by mine subsidence and, therefore, the "subsidence regulation is based on a permissible interpretation of the SMCRA." *Id.* at 460.

Reacting to the court of appeals decision in *Lujan*, on April 17, 1991, OSM Deputy Director W. Hord Tipton once again wrote to Mr. E.W. Wayland, then Commissioner of the West Virginia DOE, notifying him of the court of appeals' decision. The deputy director advised the commissioner as follows:

> "Since these Federal rules [deferring to state where subsidence damage to structures is at issue] are now restore [sic] to full force and effect,[14] the letter dated June 22, 1990 that I sent to you concerning the repair of subsidence damage to structures should be *disregarded*. We will shortly initiate rulemaking to remove 30 CFR 948.15(k)(11), which disapproved the phrase "to the extent required under applicable provisions of State law" in the State regulations at CSR

---

[14] It is undisputed that the pertinent federal regulations in effect at the time the Appellees made their representations to the Appellants expressly limited the obligation of an operator to repair or compensate an owner for damage to structures "[t]o the extent required under applicable provisions of State law." 30 C.F.R. § 817.121(c).

> 38-2-16.2(c)(2). Please note that no State program changes were required by my previous letter and none are needed now [.]" (Footnote added).

Subsequently, the OSM issued a federal register notice rescinding the limitation placed on the West Virginia state program in their May 23, 1990, notice.[15] 56 Fed. Reg. 50256 (October 4, 1991).

The Appellants contend that the regulation that deleted any deference to state law with regard to structure repair resulting from subsidence that was to take effect on June 1, 1991, was the controlling regulation at the time Consol misrepresented to them that it had no liability for damage to structures. The Appellants' argument, however, that because of this regulation, Consol knew or had reason to know that the law in effect in this state at the time Mr. Shelek was talking with them required Consol either to repair subsidence damage or to compensate the owner for the damage is flawed.

It is clear that in order for the regulation that was supposed to take effect on June 1, 1991, to have actually become effective, it first had to be approved by the OSM, as indicated by the following provision:

---

[15] According to the Appellees, the state withdrew the entire package of the January 17, 1991, proposed amendments to the West Virginia regulatory program at the OSM's request following the court of appeals' decision in *Lujan*. *See* 928 F.2d at 460. It was not until July 30, 1993, that the proposed change in the subsidence regulation deleting the language expressly deferring to state law in regard to subsidence damage to structures was resubmitted to the OSM by the state – nine months after passage of the national Energy Policy Act of 1992.

> (g) Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the Director as an amendment. *No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.*

30 C.F.R. § 732.17(g) (emphasis added). We acknowledged the importance of this regulation in *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 191 W. Va. 719, 447 S.E.2d 920 (1994), when we stated:

> The DEP's contention that 38 W. Va. C.S.R. § 2-12.4(d) (1993) does not impose a mandatory, nondiscretionary duty on the DEP to utilize money from the SRF [(Special Reclamation Fund)] to complete reclamation at all bond forfeiture sites, including AMD [(acid mine drainage)] treatment and abatement, is without merit. The 1993 version of that regulation must be approved by the OSM to be effective. . . . The OSM has not approved the 1993 version of that regulation.

191 W. Va. at 724, 447 S.E.2d at 925 n. 23. Accordingly, pursuant to 30 Code of Federal Regulations § 732.17(g), whenever changes to laws or regulations that make up the approved state program regarding surface mining reclamation are proposed by the state, no such change to the laws or regulations shall take effect for purposes of a state program until approved as an amendment by the OSM.

It appears from the record before us that the OSM never approved or disapproved the 1991 regulation that

the state had submitted.[16] Consequently, the Appellants rely upon the OSM's approval of the state's regulation on May 23, 1990, wherein the OSM disapproved the language deferring to state law regarding structure damage due to the district court opinion in *Lujan*, as, in essence, a pre-approval of the regulation that was to be effective June 1, 1991. The Appellants' pre-approval argument, however, ignores all the events that occurred between May 23, 1990, and June 1, 1991.

Specifically, the pre-approval argument fails to take into account the United States Court of Appeals reversal of the district court in *Lujan* on March 22, 1991, on the grounds that the SMCRA does not impose a duty to restore structures damaged by subsidence. *See* 928 F.2d at 458. The effect of the court of appeals' decision was to restore the federal regulation to its "full force and effect," as indicated by the OSM's deputy director's letter to the DOE commissioner. While the Appellants argue that "[d]espite knowledge of the Court of Appeals ruling, West Virginia did not promulgate a new structure repair regulation restoring the state law limitation . . . clearly ignor[ing] the Appeals Court decision[,]" they overlook that the reason the state took no action was because the deputy director of the OSM informed the DEP commissioner to disregard his prior letter that initiated the regulation amendment which deleted state law deference.

---

[16] The OSM regulations also require the agency to issue a federal register notice on any proposed state program amendment and accept public comment, prior to the OSM either approving or disapproving the amendment. *See* 30 C.F.R. § 732.17(h). There was no notice or opportunity for public comment regarding the state regulation.

Furthermore, the deputy director stated that no action was necessary by the state because the OSM was going to remove its prior disapproval of the language "[t]o the extent required under applicable provisions of State law."[17]

Additionally, to accept the Appellants' argument that the state ignored the court of appeals decision in *Lujan* because the state wanted to impose a duty upon operators to correct or compensate a landowner for structural damage arising from subsidence damage would require us to disregard our decision in *Canestraro v. Faerber,* 179 W. Va. 793, 374 S.E.2d 319 (1988). In syllabus point one of *Canestraro,* we held that

> [w]hen a provision of the West Virginia Surface Coal Mining and Reclamation Act, *W. Va. Code,* 22A-3-1 *et seq.,* is inconsistent with federal requirements in the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.,* the state act must be read in a way consistent with the federal act.

179 W. Va. at 793, 374 S.E.2d at 319, Syl. Pt. 1; *accord Rose v. Oneida,* 195 W. Va. 726, ___ 466 S.E.2d 794, 800 (1995) (*"Oneida II"*) (stating that "under the rule of primacy recognized in *Canestraro,* and its progeny, we are required to give deference to the federal law" if more than minor variations existed in the language of the state statute as

---

[17] The deputy director's letter was followed by the federal register notice rescinding the limitation originally placed on the state program by the OSM in response to the district court's opinion in *Lujan.* 56 Fed. Reg. at 50266.

compared to the federal counterpart and the respective regulations).

In light of the principle established in the *Canestraro* decision, we hold that a state regulation enacted pursuant to WVSCMRA must be read in a manner consistent with federal regulations enacted in accordance with SCMRA. Therefore, it is certainly possible that if the state regulation in existence at the time the Appellants aver that the Appellees misrepresented the state of the law to them is read in a manner consistent with the federal regulation, Consol was under no duty to repair structural damage that resulted from subsidence damage it caused, since it was clear that no duty existed under the federal regulation.

Accordingly, we cannot find that the trial court improperly granted a summary judgment based upon the Appellants' theory that the state regulation mandated that Consol repair the structural damage to their property. Since the whole procedural history behind the pertinent regulation is murky at best, it is impossible to find that the Appellees intentionally made material and false representations to the Appellants regarding their liability according to the regulations. *See* Syl. Pt. 1, *Lengyel*, 167 W. Va. at 272-73, 280 S.E.2d at 67.

B.

STATE'S COMMON LAW

We must also examine the Appellees' representations to the Appellants in connection with the state's common law regarding subjacent support. It is undisputed that

West Virginia common law permits surface owners to waive the right to subjacent support. As we stated in the syllabus of *Rose v. Oneida Coal, Co.*, 180 W. Va. 182, 375 S.E.2d 814 (1988) (*"Oneida I"*):

> Under the West Virginia common law of property, the well recognized and firmly established rule is that when a landowner has conveyed the minerals underlying the surface of his land, he retains the right to the support of the surface in its natural state, but the owner of land may release or waive his property right of subjacent support by the use of language that clearly shows that he intends to do so; however, this law has been modified to some extent by the enactment of the West Virginia Coal Mining and Reclamation Act, *W. Va. Code*, 22A-3-1 [1985], *et seq.* and the extent of such modification will be ruled upon when properly presented.

Id. at 183, 375 S.E.2d at 815; *accord* Syl. Pt. 1, *Winnings v. Wilpen Coal Co.*, 134 W. Va. 387, 59 S.E.2d 655 (1950), *Continental Coal Co. v. Connellsville By-Product Coal Co.*, 104 W. Va. 44, 55-56, 138 S.E. 737, 741 (1927). The only requirement for the waiver to be valid is that the language purporting to waive the property right of subjacent support must show a clear expression of the landowner's intent to accomplish a waiver. *See Oneida I*, 180 W. Va. at 183, 375 S.E.2d at 815, Syl. Pt. 1.

Courts in this jurisdiction that have examined the validity of subjacent support waivers within severance deeds have consistently upheld the validity of these waivers under this state's common law. In *Sendro v. Consolidation Coal Co.*, No. 89-0009-W(S) (N.D.W. Va. March

27, 1991), the United States District Court for the Northern District of West Virginia, in an order granting the defendant partial summary judgment,[18] examined subjacent support waiver language identical to the language contained in the severance deeds entered in the instant case. *Id.*, slip op. at 1. Like the Appellants in the present case, the plaintiffs in *Sendro* had entered into an agreement with the defendant that governed compensation for damages to the plaintiffs' real estate resulting from longwall mining.[19] *Id.*, slip op. at 2.

The *Sendro* court addressed whether the SMCRA and the WVSCMRA had changed this state's common law, thereby rendering the subjacent support waivers invalid. *Id.*, slip op. at 11-14. The district court, in concluding that such a change had not occurred, reasoned:

> The District of Columbia Court has held that "[t]here is no indication from the Act that Congress intended to pre-empt state common law. Indeed, it is apparent that the Act and state common law can co-exist and serve the goals of the statute." *In re Permanent Surface Mining Regulation Litigation II, Round II*, 21 Env't Rep. Cas. (BNA) 1724 (D.D.C. Oct. 1, 1984). That court also found that "[s]tate law will be applied in this

---

[18] The district court found that the plaintiff's breach of contract action was not affected by the subjacent support waiver and contained issues of fact that had to be decided by a jury. *Sendro, supra*, slip op. at 11.

[19] Under the terms of the agreement, the defendant paid the plaintiffs $5,325 consideration and agreed to reimburse the plaintiffs for damage to their home in accordance with certain procedures. *Id.*, slip op. at 2.

> area to the extent it is consistent with the statutory scheme set out by Congress." *Id.*

Sendro, slip op. at 14; *accord Giza v. Consolidated Coal Co.*, No. 85-0056-W(S) (N.D.W. Va. December 12, 1991); *Coffield v. Consolidated Coal Co.*, No. 90-C-181M (W. Va. Cir. Ct. Marshall County January 9, 1992).

In *Smerdell v. Consolidation Coal Co.*, 806 F.Supp. 1278 (N.D.W. Va.1992), another apposite case, property owners brought action the defendant coal mining company to recover damages to property allegedly caused by coal mining activities. *Id.* at 1279. The plaintiffs owned the surface rights to real property, but

> plaintiffs' predecessors in title conveyed to defendant's predecessors in title "all of the coal of the Pittsburgh or River Vein in and under" plaintiffs' real property, "[t]ogether with the right to mine and remove all and every part of said coal with free access at all times for said purposes, and without liability for any damage to the overlying strata, or to anything therein or thereon, in mining and removing said coal."

Id. at 1280. The defendant filed a motion for summary judgment arguing that the subjacent support waiver contained within the 1905 deed waived the plaintiffs' right to subjacent support as well as any right to recover for subsidence damages caused by the defendant's negligent mining. The plaintiffs, however, contended that SMCRA and WVSCMRA rendered the purported waivers of the plaintiffs' predecessors in title void. *Id.*

In granting the defendant's motion for summary judgment, the district court stated: "Under West Virginia common law . . . by applying the facts and considering

the language in the 1905 deed, plaintiffs by their predecessors validly waived any subjacent support for the tract in question as well as any right to recover from defendant for damages resulting from subsidence caused by negligent mining." *Id.* at 1283. Moreover, the court concluded "that SMCRA and WVSCMRA have not rendered invalid the common law of West Virginia on waivers of the right to subjacent support." *Id.* at 1284.

Consequently, the above-mentioned court decisions indicate that the SMCRA and the WVSCMRA had not pre-empted this state's common law. Because of these decisions, we cannot find that the Appellees' representation to the Appellants that Consol was not legally liable to them for damages resulting from subsidence in light of the valid severance deed waiver of subjacent support was either made with the intent to deceive or was a material and false representation. *See. See* Syl. Pt 1, *Lengyel,* 167 W. Va. at 272-73, 280 S.E.2d at 67.

Based upon our conclusion that the Appellants failed to make sufficient showing on essential elements of their case that they have the burden to prove, we find that lower court committed no error in entering summary judgment in favor of the Appellees. Syl. Pt. 4, *Painter,* 192 W. Va. at 190, 451 S.E.2d at 756. Accordingly, we affirm the circuit court's decision.

Affirmed.

APPENDIX B

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

CHARLES SCHULTZ and
CLAUDIA SCHULTZ,

Plaintiffs,

vs. // Civil Action No. 93-C-50K

CONSOLIDATION COAL COMPANY, a foreign corporation, and
BERT SHELEK,

Defendants.

ORDER

On January 17, 1995, this Court granted the Defendants' Motion for Summary Judgment and asked that the parties submit a proposed Order memorializing the Court's ruling. On February 6, 1995, counsel for the Plaintiffs and Defendants submitted an Agreed Order in compliance with the Court's request. On February 14, 1995, Plaintiffs' counsel submitted a second Order to the Court which was identical to the Agreed Order submitted on February 6, 1995, with the exception of the following language:

> "The Court finds that the broad form damage waiver set forth in the coal severance Deed is binding and effective and accordingly insulates the defendants in this case from the fraud claims alleged in the plaintiffs' Complaint."

On March 28, 1995, Plaintiffs filed a Motion seeking the entry of the Order submitted by Plaintiffs on February 14, 1995. A hearing was held on Plaintiffs' Motion on May 5, 1995. The Court, after hearing argument of counsel, denied the Plaintiffs' Motion for the entry of the Order submitted on February 14, 1995, and held that the Agreed Order submitted by the parties on February 6, 1995, which does not include the language set forth above, would be entered. Accordingly, it is

ORDERED that the following Memorandum Opinion and Order be entered.

MEMORANDUM OPINION AND ORDER

On January 17, 1995, this Court considered Defendants' Motion for Summary Judgment as to all claims asserted by the Plaintiffs. There appeared at hearing the Defendants by their counsel H. Brann Altmeyer, William A. Kolibash and Dean K. Hunt, all appearing in person. There also appeared counsel for the Plaintiffs, Michael G. McGuane and Thomas C. Schultz, in person, and Robert J. Shostak, by telephone.

Regarding the issue of the mining rights held by the Defendant, Consolidation Coal Company, and Plaintiffs' contentions that certain written and oral statements by the Defendants with regard to those rights constitute fraudulent misrepresentations, the Court is persuaded by the arguments advanced by defense counsel and supporting authority, including the decisions of the United States District Court for the Northern District of West Virginia in *Giza v. Consolidation Coal Company,* Civil Action No. 85-0056-W(S) (N.D. W.Va. 1992), *aff'd,* 972 F.2d 339 (4th

Cir. 1992); *Sendro v. Consolidation Coal Company,* Civil Action No. 89-0009-W(S), slip op. (N.D. W.Va. March 27, 1991); and *Smerdell v. Consolidation Coal Company,* 806 F.Supp. 1278 (N.D. W.Va. 1992); and further, the decision of Circuit Judge John T. Madden of this Court, in *Coffield v. Consolidation Coal Company,* Civil Action No. 90-C-181, Slip op. (Marshall Co. Cir. Ct. January 8, 1992). The Court is of the opinion that Defendants are entitled to summary judgment with regard to the allegation of fraudulent misrepresentation, and accordingly concludes that the subject Subsidence Agreement is valid and binding. Accordingly, it is hereby

ORDERED that Defendants be, and they hereby are, granted summary judgment as to all claims asserted by the Plaintiffs. The exceptions and objections of the Plaintiffs to the relief accorded herein are noted and preserved.

The Clerk is directed to mail attested copies of this Order to counsel of record, and this case is hereby removed from the active docket of this Court.

Enter: May 22, 1995

/s/ Mark A. Karl
Mark A. Karl,
Circuit Judge

Approved as to Form:

/s/ H. Brann Altmeyer
Of Counsel to Defendants

Of Counsel to Plaintiffs

A Copy Teste:

By /s/ R. Ealy Clerk

By /s/ Illegible Deputy

APPENDIX C

West Virginia
Surface Mining Reclamation
Regulations

(Seal)

West Virginia
Department of Commerce Labor
and Environmental Resources

Division of Energy

Effective Date June 1, 1991

GASTON CAPERTON
Governor

LEGISLATIVE RULES
DIVISION OF ENERGY
SERIES 2
WEST VIRGINIA SURFACE MINING
RECLAMATION REGULATIONS

38-2-1 General.

1.1 Scope. These regulations establish general and specific rules for permit application requirements and contents; haulageways or access roads; drainage and sediment control systems; blasting; premining and postmining land use; fish and wildlife considerations; revegetation; prime farmlands; insurance and bonding; replacement, release, and forfeiture of bonds; requirements of a notice of intent to prospect; performance standards; performance standards applicable to underground mining operations; subsidence control; small operator assistance program; citizen's actions; designation of areas unsuitable for mining; inspection and enforcement; Reclamation Board of Review; and Coal Refuse.

1.2 Applicability

(a) These rules and regulations apply to all prospecting and surface mining operations in the State of West Virginia, except the applicable subsections in Section 26, Article 3, Chapter 22A of the Act. The provisions of this paragraph do not constitute the issuance of a new permit for purposes of permit renewal or mid-term review of existing permits.

(b) Permits issued after the effective date of these regulations shall incorporate in the application all of the requirements of these regulations.

1.3 Authority These rules and regulations are promulgated under the authority of the West Virginia Energy Act as provided in Section 15, Article 1, Chapter 22 of the Code of West Virginia, 1931, as amended and West Virginia Surface Coal Mining and Reclamation Act as provided in Section 4, Article 3, Chapter 22A of the Code of West Virginia, 1931, as amended.

1.4 Filing Date. April 8, 1991

1.5 Effective Date. June 1, 1991

* * *

2.10 Affected Area means, when used in the context of surface-mining activities, all land and water resources within the permit area which are disturbed or utilized during the term of the permit in the course of surface-mining and reclamation activities. Affected area means, when used in the context of underground mining activities, all surface land and water resources affected during

the term of the permit (1) by surface operations or facilities incident to underground mining activities or (2) by underground operations.

* * *

3.12 Subsidence Control Plan.

(a) Each application for an underground coal mining permit shall contain a subsidence control plan which includes the following:

(1) A survey that identifies, on a topographic map of a scale of 1″ = 1,000′ or less, structures, perennial and intermittent streams or renewable resource lands and whether or not subsidence could cause material damage or diminution of value or use of such structures or renewable resources lands both on the permit area and adjacent areas within a critical angle of deformation of at least 15°;

* * *

16.2 Surface Owner Protection.

(a) General. Each person who conducts underground mining activities shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method of room-and-pillar mining.

(b) Plan Requirements. The operator shall comply with all provisions of the approved subsidence control plan prepared pursuant to subsection 3.12 of these regulations.

(c) Material Damage. The operator shall:

(1) Correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable which it was capable of supporting before subsidence; and

(2) Either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase prior to mining of a non-cancelable premium-prepaid insurance policy.

* * *

APPENDIX D

Federal Register
Vol. 61, No. 35
Wednesday, February 21, 1996
Rules and Regulations

30 CFR Part 948

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; Approval of amendment.

SUMMARY: OSM is approving with certain exceptions an amendment to the West Virginia permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment contains revisions to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) and the West Virginia Surface Mining Reclamation Regulations. The amendment is intended to make the West Virginia program consistent with SMCRA and the corresponding Federal regulations. Additional amendments will be required to bring the West Virginia program into full compliance with SMCRA.

* * *

EFFECTIVE DATE: February 21, 1996. Approval dates of regulatory program amendments are listed in § 948.15(p).

FOR FURTHER INFORMATION CONTACT:

Mr. James C. Blankenship Jr., Director, Charleston Field Office, Office of Surface Mining Reclamation and

Enforcement, 1027 Virginia Street East, Charleston, WV 25301, Telephone (304) 347-7158.

* * *

I. Background

SMCRA was passed in 1977 to address environmental and safety problems associated with coal mining. Under SMCRA, OSM works with States to ensure that coal mines are operated in a manner that protects citizens and the environment during mining, that the land is restored to beneficial use following mining, and that the effects of past mining at abandoned coal mines are mitigated.

* * *

II. Submission of the Amendment

In a series of three letters dated June 28, 1993, and July 30, 1993 (Administrative Record Nos. WV-888, WV-889 and WV-893), the West Virginia Division of Environmental Protection (WVDEP) submitted an amendment to its approved permanent regulatory program that included numerous revisions to the West Virginia Surface Coal Mining and Reclamation Act (referred to herein as "the Act", WVSCMRA § 22A-3-1 *et seq.*) and the West Virginia Surface Mining Reclamation Regulations (CSR § 38-2-1 *et seq.*). OSM approved the proposed revisions on durable rock fills on August 16, 1996, (60 FR 42437-42443) and the proposed revisions on bonding on October 4, 1995, (60 FR 51900-51918). The remaining proposed revisions are the subject of this notice.

* * *

8. CSR § 38-2-3.12 Subsidence Control Plan

The State proposes to revise paragraph (a), subparagraph (5) to require that measures be taken to mitigate or remedy material damage to structures due to subsidence in accordance with subsection 16.2(c) and (d) in addition to the existing requirement of meeting 16.2(a) concerning surface owner protection. While there is no direct Federal counterpart to this proposal, the Director finds the proposed revisions to be consistent with the Federal requirements at 30 CFR 784.20(b) concerning subsidence control plans.

* * *

41. CSR 38-2-16.2 Subsidence Control; Surface Owner Protection

West Virginia proposes to revise paragraph (c) of this subsection by deleting the phrase, "To the extent required under applicable provisions of State law." This revision is intended to correct the deficiency noted at 30 CFR 948.15(k)(11). The Director finds the proposed deletion does not render the West Virginia program less effective than 30 CFR 817.121(c)(2), and satisfies the deficiency noted at 30 CFR 948.15(k)(11).

* * *

V. Director's Decision

Based on the above findings, and except as noted below, the Director is approving with certain exceptions and additional requirements the proposed amendments

as submitted by West Virginia on June 28, 1993, as modified on July 30, 1993; August 18, 1994; September 1, 1994; and May 16, 1995. As discussed in the findings, there are some exceptions to this approval, and those are noted below. The Director is also requiring the State to make additional changes to certain provisions to ensure that the program is no less stringent than SMCRA and no less effective than the Federal regulations. Those requirements are also noted below.

* * *

The Director is amending 30 CFR Part 948 to codify this decision. With respect to those changes in State laws and regulations approved in this document, the Director is making the effective date of this approval retroactive to the date upon which they took effect in West Virginia for purposes of State law. He is taking this action in recognition of the extraordinarily complex nature of the review and approval process for this amendment and the need to affirm the validity of State actions taken during the interval between State implementation and the decision being announced today. Retroactive approval of these provisions is in keeping with the purposes of SMCRA relating to State primacy and environmental protection.

To assure consistency with 30 CFR 732.17(g), which state that "[no] * * * change to laws or regulation shall take effect for purposes of a State Program until approved as an amendment." The Director's approval of the revisions, as noted in the codification below, includes West Virginia's previous and ongoing implementation of these revisions.

Retroactive approval of the revisions is appropriate because no detrimental reliance on the previous West Virginia laws or regulations has occurred for the period involved. OSM is approving these changes back only to the dates from which West Virginia began enforcing them. As support for this decision, the Director cites the rationale employed by the United States Claims Court in *McLean Hosp. Corp. v. United States*, 26 Cl.Ct. 1144 (1992). In *McLean*, the court held that retroactive application of a rule was appropriate where the rule was identical in substance to guidelines which had been in effect anyway during the period in question. Therefore, the Court concluded, the plaintiff could not "claim that it relied to its detriment on a contrary rule." 26 Cl.Ct. at 1148. Likewise, since the Director is approving changes which the State has been enforcing there can be no claim of detrimental reliance on any contrary West Virginia Statutes or regulations in this instance.

Making portions of the approval retroactive does not require reopening of the public comment period under section 553(b)(3) of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3). The public, in general, and the coal industry in particular have had sufficient notice of these revised statutory and regulatory revisions to support retroactive OSM approval. Retroactive approval constitutes an acknowledgement of statutory and regulatory revisions which West Virginia has been implementing since the respective approval dates of these revisions at the State level, and would have been expected as a natural outgrowth of the proposal. The retroactive approval does not apply to earlier versions of these provisions to

the extent that such provisions were inconsistent with Federal requirements.

Furthermore, "good cause" both under section 553(b)(3)(B) of the APA, 5 U.S.C. 553(b)(3)(B), for retroactive approval (if notice were not sufficient) and under section 553(d)(3) of APA, 5 U.S.C. 553(d)(3), for not delaying the effective date of the approval for 30 days after the publication of this **Federal Register** decision document. As noted in the findings above, many of these program revisions are needed to render the West Virginia program consistent with SMCRA and no less effective than the Federal regulations.

Failure to make OSM approval of these statutory and regulatory provisions retroactive could cause significant disruption to the orderly enforcement and administration by the State of the West Virginia program. The Director believes that the desire to avoid a significant disruption of the West Virginia program, coupled with the lack of any prejudice to the public or to the regulated community, are sufficient bases to constitute "good cause."

Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State submits and obtains the Secretary's approval of a regulatory program. Similarly, 30 CFR 732.17(a) requires that the State submit any alteration of an approved State program to OSM for review as a program amendment. Thus, any changes to the state program are not enforceable until approved by OSM. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved

State programs. In oversight of the West Virginia program, the Director will recognize only the statutes, regulations and other materials approved by OSM, together with any consistent implementing policies, directives and other materials, and will require the enforcement by West Virginia of only such provisions. The provisions that the Director is approving today will take effect on the specified dates for purposes of the West Virginia program.

* * *

PART 948 – WEST VIRGINIA

1. The authority citation for Part 948 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

* * *

§ 948.15 Approval of regulatory program amendments.

* * *

(p)(1) *General description and effective dates.* Except as noted in paragraph (p)(3) of this section, the amendment submitted by West Virginia to OSM by letter dated June 28, 1993, as revised by submittals dated July 30, 1993; August 18, 1994; September 1, 1994; and May 16, 1995, is approved to the extent set forth in paragraph (p)(2) of this section. The effective dates of the Director's approval of the provisions identified in paragraph (p)(2) of this section are:

* * *

(ii) June 7, 1991, for those amendments contained in SB-579;

* * *

(x) June 1, 1991, for those changes submitted on July 30, 1993 (WV-893) which were not identified as changes in the June 28, 1993, submittal (WV-889);

* * *

(2) Approved Revisions

* * *

(ii) Revisions to the West Virginia Surface Mining Reclamation Regulations

1. CSR § 38-2-1.2 – Applicability; except subsection 1.2(c)(1) to the extent that it does not require compliance with the Federal initial program regulations at Subchapter B or the West Virginia permanent regulatory program as a prerequisite to the termination of jurisdiction over an initial program site.

2. CSR 38-2-2 – Definitions; except to the extent that the definition of "chemical treatment" at CSR 38-2-2.20 would be applied in the context of section CSR 38-2-12.2(e) to authorize bond release for sites with discharges that require passive treatment to meet discharge standards.

3. CSR § 38-2-3.1(o) – Application information to the extent that all permit applicants which maintain centralized ownership and control files are also required to comply with all of the informational provisions contained in CSR 38-2-3.1.

4. CSR § 38-2-3.4 – Maps.

5. CSR § 38-2-3.6 – Operation Plan.

6. CSR § 38-2-3.7 – Excess Spoil.

7. CSR § 38-2-3.8 – New and Existing Structures and Support Facilities.

8. CSR § 38-2-3.12 – Subsidence Control Plan.

* * *

41. CSR § 38-2-16.2 – Subsidence Control; Surface Owner Protection.

* * *

APPENDIX E

Distributed: T. Fleming, F. Shrave, B. Wiles, S. Brand, M. Carico, D. Lehmann, R. Sturm, B. Zickefoose 4/8/93 - DM

[SEAL]

DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES
DIVISION OF ENVIRONMENTAL PROTECTION

10 MoJunkin Road
Nitro, WV 25143-2506
MEMORANDUM

Illegible	David C. Callaghan
Illegible	Director
Illegible	Ann. A Spaner
Illegible	Deputy Director

TO: Rocky Parsons and Ed Griffith (Distribution to all I&E and Permitting Personnel)

FROM: John C. Ailes, Jr., Chief

DATE: March 23, 1993

SUBJECT: Subsidence Regulation Clerification

Any permit issued *before* June 1, 1991, has to include a waiver to subside without liability. The waiver approval must have been based on a deed, lease, or other binding legal document. If a permit was issued prior to June 1, 1991, and does not contain the above mentioned waiver or right to subside, then the applicable portions of the subsidence regulations must be enforced.

For permits issued *after* June 1, 1991, the regulations do not allow for waiving subsidence liability.

Permits submitted before June 1, 1991, but issued after June 1, 1991, are to be considered liable for subsidence damage.

If you have any questions, please contact Jeff McCormick or myself in the Nitro Office.

JCA/cl

APPENDIX F

[SEAL]

DIVISION OF ENVIRONMENTAL PROTECTION
10 McJunkin Road
Nitro, WV 25143-2506

GASTON CAPERTON — GOVERNOR

DAVID C. CALLAGHAN — DIRECTOR

January 11, 1995

Mr. James C. Blankenship, Jr.
Director, Charleston Field Office
Office of Surface Mining, Reclamation,
and Enforcement
1027 Virginia Street, East
Charleston, West Virginia 25301

RE: Subsidence Damage and Related Provisions of the EPACT

Dear Mr. Blankenship:

This is in response to your letter of December 16, 1994 requesting information about the provisions of our regulatory program in comparison to the Energy Policy Act of 1992 (EPACT). That letter basically asked the WVDEP to determine whether or not we have counterpart statutory and regulatory authority consistent with the subsidence and water replacement provisions of EPACT.

It is our belief that the provisions of our program are adequate to fully implement the letter and intent of

EPACT. We have been requiring repair of material damage to structures for some time, and we have had a state requirement to replace water supplies damaged or lost due to underground mining since long before SMCRA was passed. The only possible exception is that our statute at 22-3-24(b) as currently drafted allows for a waiver of water replacement rights by current landowners. Apparently, OSM takes the position that even the owner of a water supply may not waive its replacement. This issue is already being addressed through the program amendment process.

We have not done a new legal analysis of our program subsequent to your December 16, 1994 letter, and we reserve the right to define our provisions at the appropriate time in the event OSM should decide our program is deficient in some manner. We do believe, however, that the complete and thorough program amendment process of the last several years, coupled with that still underway, has adequately addressed the EPACT issues. Dennis Boyles of your staff and I recently discussed these questions, and Dennis prepared a memo to me on January 9, 1995 (attached). We believe Dennis is well informed on this issue as it relates to our program, and that his analysis is generally correct. As mentioned above, should OSM determine otherwise, we will respond at that time.

We have not tabulated the number of complaints alleging subsidence-related damage, as requested by the December 16 letter. As you know, we receive and deal with approximately 1,000 complaints per year. Even though our automated recordkeeping system includes some information on each complaint, it does not provide

the capability to sort and tabulate complaints based on type. To do so as requested by your letter would require a manual review of approximately 2,000 complaints received and processed since October 24, 1992. If OSM needs that level of detail, our files are open to you, and we will be glad to allow OSM staff to complete the requested tabulation.

The number of underground coal mines "in operation" varies. There may also be differing interpretations of the phrase "in operation" or of the term "active." Based on our definition and usage, there are approximately 650 active underground mines in operation in West Virginia at this time.

I hope this information will suffice to answer your inquiry. Please contact me if anything else is needed.

Sincerely yours,

/s/ Stephen C Keen
Stephen C. Keen
Assistant Director

SCK:cc

Attachment

cc: David Callaghan
Roger T. Hall
John Ailes
Jeff McCormick

APPENDIX G

STATE OF WEST VIRGINIA

Department of Energy
DIVISION OF MINES AND MINERALS

[SEAL]

Permit No. **U-1025-91** Effective Date December 31, 1991

S.M.A. No. **1025-91** Expiration Date December 31, 1996

NPDES No. **WV0004201**

THINK RECLAMATION THINK RECLAMATION

SURFACE MINING
Permit To Engage In Surface Mining

Issued to

Name of Applicant or Company **CONSOLIDATION COAL COMPANY**

County **Marshall** Magisterial District **Sandhill/ Union**

Nearest Post Office **Benwood, West Virginia**

Limited to **260.00** Acres

Pursuant to Article 3, Chapter 22A of the Code of West Virginia, a Permit is hereby granted to the above named principal to engage in surface mining in the State of West Virginia. As a condition of this permit, all surface coal mining and reclamation operations shall be conducted as described in and in compliance with the complete application and only on those lands specifically designated on the map(s) submitted. All operations shall be conducted to prevent significant imminent environmental harm to the health or safety of the public. The permittee shall, as soon as possible after learning of such condition or of

noncompliance with any term or condition of the permit, warn any person whose health and safety is in imminent danger and the Permittee shall immediately commence implementation of measures necessary to comply and shall also accelerate or provide the additional monitoring necessary to determine the nature and extent of such noncompliance.

The following are special terms and conditions of this permit: The operator shall notify the inspector five (5) days prior to beginning of operations unless operation begins within five (5) days of permit issuance.

_____

_____

A copy of this permit shall be kept at the site of the operation at all times.

/s/ Illegible
Commissioner, Department
of Energy

By: _____

_____

APPENDIX H

SUBSIDENCE AGREEMENT

THIS AGREEMENT, made and entered into this 17 day of August, 1992, by and between Consolidation Coal Company, a Delaware corporation, 1800 Washington Road, Pittsburgh, Allegheny County, Pennsylvania 15241, hereinafter "Consol"

AND

Charles E. Schultz and Claudia M. Schultz, his wife, Social Security Number 235-66-5972, of RD3 Box 150-A, Sandhill District, Marshall County, West Virginia, hereinafter collectively referred to as "Surface Owner".

WITNESSETH:

WHEREAS, Surface Owner is the owner of the surface of a certain tract or parcel of land located in Sandhill District, Marshall County, West Virginia, containing 86 acres, more or less, the same being shown outlined in green on the map designated as Exhibit "A" attached hereto and made a part hereof, hereinafter referred to as "Surface Land"; and

WHEREAS, for chain of title to said Surface Land, reference is made to all or part of the propertys conveyed unto Surface Owner by Carl F. Schultz, through instruments dated December 7, 1970, June 19, 1975, May 29, 1981, and of record in the Marshall County Clerk's Office in Deed Book No. 416, 480, 492 page 150, 511, 644; respectively and

WHEREAS, Surface Owner is also the owner of certain structure(s) situate on the hereinbefore described Surface Land, the same being shown outlined in blue on said Exhibit "A", and more particularly described as follows: (1) Brick Panel Dwelling w/ concrete Block Garage (2) One Story Frame Dwelling, w/ Frame Dwelling

WHEREAS, Consol owns, leases or controls coal located beneath said Surface Land and structures, and Consol intends to mine and remove part or all of said coal during its mining operations in the near future; and

WHEREAS, FOR CHAIN OF TITLE to said coal reference is made to Item No. I, Subdivision 10.05, Marshall County, Division X, State of West Virginia, Exhibit "A" in deed from Consolidation Coal Company, a Pennsylvania corporation, dated September 15, 1966, and of record in the Office of the Clerk of the County Commission of Marshall County, West Virginia in Deed Book Volume 387, page 300; and

WHEREAS, Consol has mining rights which permit it to mine and remove such coal located beneath the Surface Land and Structures described herein without liability for any damage done to anything upon the Surface Land upon which said Structures are located; and

* * *

APPENDIX I

Federal Register
Vol. 60, No. 145
Friday, July 28, 1995
Rules and Regulations

30 CFR Part 948

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Notice of decision.

SUMMARY: OSM is announcing its decision on initial enforcement of underground coal mine subsidence control and water replacement requirements in West Virginia. Amendments to the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the implementing Federal regulations require that underground coal mining operations conducted after October 24, 1992: Promptly repair or compensate for subsidence-caused material damage to noncommercial buildings and to occupied dwellings and related structures and promptly replace drinking, domestic, and residential water supplies that have been adversely affected by underground coal mining. After consultation with West Virginia and consideration of public comments, OSM has decided that initial enforcement in West Virginia will be accomplished through State enforcement.

EFFECTIVE DATE: July 28, 1995.

FOR FURTHER INFORMATION CONTACT:

James C. Blankenship, Jr., Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street East, Charleston, West Virginia 25301-2816, Telephone: (304) 347-7158.

SUPPLEMENTARY INFORMATION:

* * *

C. Enforcement in West Virginia

West Virginia program activity, requirements, and enforcement. By letter to West Virginia dated December 16, 1994, OSM requested information that would be useful in determining how to implement section 720(a) of SMCRA and the implementing Federal regulations in West Virginia (Administrative Record No. WV 965). By letter dated January 11, 1995, West Virginia to this request (Administrative Record No. WV 966).

The West Virginia Division of Environmental Protection (WVDEP) notified OSM that there were approximately 650 active underground coal mines operating in West Virginia at the time. West Virginia stated that it believed the existing State program provisions are adequate to fully implement the letter and intent of section 720 of SMCRA. WVDEP further explained that its continued enforcement of its State program provisions at sections 22A-3-14(b)(1) and 22A-3-24(b) of the West Virginia Code and/or West Virginia Code of State Regulations (CSR) sections 38-2-14.5(h) and 38-2-16.2 would ensure compliance with section 720 of SMCRA.

West Virginia noted that section 22A-3-24(b) of the West Virginia Code allows for a waiver of water replacement rights by current landowners. According to WVDEP, this is part of a program amendment that is under review by OSM.

West Virginia also acknowledges that since WVDEP revised its rules on June 1, 1991, it has been requiring operators to either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owners of such structures or facilities in the full amount of the dimunition in value resulting from subsidence. In addition, West Virginia issued a policy directive on March 23, 1993, which provides that permits issued before June 1, 1991, and which have a waiver to subside without liability are exempt from the new requirements. Permits issued prior to June 1, 1991, without waivers and all permits issued after that date are required to comply with the revised regulations.

* * *